MOTION FILED JAN 13 1956 LIBRARY SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

October Term, 1955

No. [illegible]

RAPHAEL KONIGSBERG,

Petitioner,

vs.

THE STATE BAR OF CALIFORNIA and the COMMITTEE OF BAR EXAMINERS OF THE STATE BAR OF CALIFORNIA,

Respondents.

Motion for Leave to File Amicus Curiae Brief and Brief of National Lawyers Guild, Los Angeles and Hollywood-Beverly Hills Chapters, as Amicus Curiae on Behalf of Petition for Writ of Certiorari.

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF.

As provided in Rule 42, Rules of the Supreme Court, the National Lawyers Guild, Los Angeles and Hollywood-Beverly Hills Chapters, hereby moves for leave to file a brief *amicus curiae* on behalf of petition for writ of certiorari, the nature of this movant's interest, the facts or questions of law that have not been, or reasons for believing they will not adequately be presented by the parties and their relevancy to the disposition of the case being hereinafter stated as argument.

DANIEL G. MARSHALL,
Attorney for Amicus Curiae.

ROBERT W. KENNY, President
National Lawyers Guild, Los Angeles
and Hollywood-Beverly Hills Chapters,

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AMICUS CURIAE BRIEF.

ARGUMENT.

I.

Nature of Interest of Amicus Curiae.

This *amicus curiae* is a chapter of National Lawyers Guild, a national bar association which was founded in 1937. It has engaged in activities traditional to bar associations, seeking in numerous respects to enhance the standards of the legal profession, to advance the administration of justice and to improve substantive and procedural law, to protect democratic institutions and the constitutional rights of all to liberty.

This *amicus curiae* files briefs, releases studies and reports, submits testimony and recommendations to legisla-

tive committees, including recommendations with respect to standards of admission to the bar, holds conferences and meeting, takes positions on legislation and other questions of public importance.

The only prerequisite to membership in the National Lawyers Guild is membership in the bar, and it has never conditioned membership on political belief or affiliation, race, color or religious tenets.

Consequently, *amicus curiae* is gravely concerned by the case at bar in which there is presented by this Court by the State Bar of California and the Committee of Bar Examiners the contention that political speech, and real or asserted political belief and affiliation, are constitutionally valid criteria to determine whether an applicant is "of good moral character."

Moreover, the members of this *amicus curiae* are likewise members of the State Bar of California.

Finally, this *amicus curiae* is a bar association officially recognized by the State Bar and currently certified to participate equally in its operation with all other similarly recognized bar associations. As a part of the integrated bar of California (The State Bar Act, Cal. Bus. & Prof. Code, Secs. 6000 *et seq.*, added by Stats. 1939, Chap. 34, Sec. 1, p. 347), it is respectfully urged that the views here expressed are entitled to be heard.

II.

Statement of Reasons for Belief That the Question of Law to Be Here Argued Will Not Be Adequately Presented by the Parties.

With deference to able counsel who represent petitioner, *amicus curiae* suggests that his principal concern necessarily is the plight of his client for whom he has the prime responsibility which he can share with no one. If his perspective is shortened it is understandable.

On the other hand, with equal deference to able counsel who represent respondents, *amicus curiae* suggests that the power and authority of their clients having been flatly challenged on serious constitutional grounds by a neophyte at the threhhold of the bar, they have appraised the problems at hand within, so it seems to *amicus curiae*, the narrow limits of the instant suit without, it seems to appear, due consideration being afforded to the impact of the protested action upon the welfare of either bar or bench, notwithstanding their asservations to the contrary.

For these reasons, *amicus curiae* believes there will not be adequately presented the question of law now to be argued.

III.

Petitioner's First Amendment Rights Were Violated by Respondents' Consideration of His Published Political Views.

If the stated propositiou is true, this First Amendment right is encompassed in the concept of liberty in the Fourteenth Amendment and state legislatures [and certainly a public corporation such as the State Bar of California (Cal, Bus. & Prof. Code, Sec. 6001)] are therefore no more competent than Congress to enact such a law or rule as the Supreme Court of California recognized *Cantwell v. Connecticut,* 310 U. S. 296, to hold in *Perez v. Sharp,* 32 Cal. 2d 711, 198 P. 2d 17.

That the proposition here asserted is present in the case at bar is established by respondent's statement that the first question here presented is: "Did the Committee of Bar Examiners violate petitioner's constitutional rights by considering newspaper articles written by petition in which he made irresponsible and unfounded attacks on the character and integrity of this Court and other respected persons?" (Resp. Br. p. 18.)

In the first place, this petitioner urges that, at least in the context of this case, the claim that petitioner's attacks were either irresponsible or unfounded must be regarded as clearly irrelevant.

The entire record establishes that respondent Committee did much more than merely "consider" these facts. It conclusively shows that the Committee forced this subject matter into the hearings.

Moreover, the views expressed in these newspaper articles obviously were of great interest to the Committee and there is no doubt that their explicit disapproval of

them was placed in the scale against petitioner in the determination of the prime question: Was he a person of good moral character?

It is not possible to measure the weight attached to the political views of petitioner and thus placed in the scale against him, but that this weight was placed there is established by the fact that the factor of political views was "considered". Nor, *amicus curiae* suggests, can the record be read in any way except to establish that these published political view were of substantial, if not controlling weight in the protested decision of respondent Committee. But even if it cannot be demonstrated that this constitutionally embargoed material was of controlling weight (a question which can be answered only in the conscience of the Committee), the record indubitably establishes that this material was received and "considered". Certainly then these published political views were placed in the scale.

This *amicus* limits its consideration of this contention to its effect on the admission of applicants to the bar of a state court. That it does so, however, should not obscure the fact that the source which replenishes the Federal bar, and [certainly the bar of this Court (Rule 5, Rules of the Supreme Court)] arises chiefly and nearly exclusively in the admission by state courts of applicants for admission.

Nor, is the fact of any moment that petitioner here is an applicant for admission, rather than a member of the bar seeking to prevent his disbarment for the cause here advanced as establishing lack of good moral character. Benevolent liberty, as guaranteed by the Fourteenth Amendment, to engage in a common occupation of life (*Meyer v. Nebraska*, 262 U. S. 390) is as much interested

in this petitioner's fate as in the fate of practitioners faced with the same claim.

At the very heart of this inquiry lies this principle which is of paramount and fundamental importance:

> "Subject to general statutory qualifications for attorneys, the power of the Federal courts to admit and disbar attorneys rests on the common law from which it was originally derived. According to Chief Justice Taney, it was well settled by the common law that 'it rests exclusively with the Court to determine who is qualified to become one of its officers, as an attorney and counsellor and for what cause he ought to be removed.' Such power, he made clear, however, is not an arbitrary and despotic one, to be exercised at the pleasure of the Court, or from compassion, prejudice, or personal hostility; but it is the duty of the Court to exercise and regulate by a sound and just judicial discretion, whereby the rights and independence of the bar may be as scrupulously guarded and maintained by the Court, as the right and dignity of the Court itself." (The Constitution of the United States of America, 1952, Legislative Reference Service, Library of Congress, Edward S. Corbin, Editor, Document No. 170, p. 527; citing *Ex Parte Secombe*, 19 How. 9, 13.)

Petitioner's editorial expressions of opinion sharply, and even if falsely, impugning certain decisions of this Court and political actions of the executive are plainly within the doctrine of *Bridges v. California*, 314 U. S. 270, and for precisely the same reasons.

Moreover, these expressions by petitioner of his views, even though expressed in militant language, in his role as citizen and publisher, would be protected by California courts even if he made them after admission and in his

role as a member of the bar under *Gallagher v. Municipal Court*, 31 Cal. 2d 784, 795-796, 192 P. 2d 905, where the Supreme Court of that State said:

> "Another consideration is the fundamental interest of the public in maintaining an independent bar. Attorneys must be given a substantial freedom of expression in representing their clients. 'An advocate is at liberty, when addressing the Court in regular course, to combat and contest strongly any adverse views of the Judge or Judges expressed on the case during its argument, to object to and protest against any course which the Judge may take and which the advocate things irregular or detrimental to the interests of his client, and to caution juries against any interference by the Judge with their functions, or with the advocate when addressing them, or against any strong view adverse to his client expressed by the presiding Judge upon the facts of a case before the verdict of the jury thereon. An advocate ought to be allowed freedom and latitude both in speech and in the conduct of his client's case.' (Oswald, Contempt of Court (3d ed), pp. 56-57. See, People v. Gongetti, 344 Ill. 107, 122 [176 N. E. 292].)"

It is crystal clear that the Fourteenth Amendment would protect a candidate for admission to the bar of California who was ruled out on the basis of statute, rule or regulation prescribing as a condition for admission a factor of race or religion. The Supreme Court of California could be depended upon to strike down such a condition as positively as they did where a factor of race was used in determining eligibility to marry. (*Perez v. Sharp, supra.*) If the constitutional protection of free speech is as strong as the solicitude of the First Amendment for the liberties involved in *Perez, supra*, then it must follow that the

action here complained of must likewise be voided as it would if promised upon a condition of race or color.

In conclusion, then, *amicus curiae* urges that there is here present in the protested action an important destruction of the protected area of speech marked out by the First Amendment and that it has particular significance since it has been inflicted upon a dedicated neophyte of the bar which has the special duty of guarding that liberty.

Respectfully submitted,

DANIEL G. MARSHALL,

Attorney for Amicus Curiae.